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CEW

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB SEPT 10, 98
U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re FMC Corporation

Serial No. 74/677,288

Timothy D. Pecsénye and Mark N. Epstein of Blank, Rome,
Comisky & McCauley for applicant.

Adam C. Striegel, Trademark Examining Attorney, Law Office
105 (Thomas G. Howell, Managing Attorney).

Before Hanak, Hohein and Walters, Administrative Trademark
Judges.

Opinion by Walters, Administrative Trademark Judge:

FMC Corporation has filed a trademark application to
register the mark shown below for "traps, namely bait
stations containing an oxidative phosphorylation uncoupler
for attracting and killing ants."¹

¹ Serial No. 74/677,288, in International Class 21, filed April 28,
1994, based on an allegation of a bona fide intention to use the mark
in commerce.



The Trademark Examining Attorney has finally refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d), on the ground that applicant's mark so resembles the following two previously registered marks, both owned by the same party, that, if used on or in connection with applicant's goods, it would be likely to cause confusion or mistake or to deceive:

ALL STAR, for, among other goods, "pesticides, namely bug and ant killing compositions for institutional and industrial use, in International Class 5";² and

² Registration No. 1,636,612, issued March 5, 1991, and owned by BRT, Inc. [Sections 8 and 15 affidavits accepted and acknowledged.] The additional goods recited in the registration, but not cited as relevant by the Examining Attorney, are "janitorial preparations, namely, toilet bowl disinfectants, disinfectants for institutional use, deodorizing preparations for institutional use" in International Class 5; and "janitorial cleaning preparations, namely, paint, spot, grease, stain, and graffiti removers, hand soaps, and floor cleaners; floor waxes, floor polishes, floor buffing and stripping compositions; furniture polish; liquid drain cleaners; carpet and upholstery shampoos; glass, tile and oven cleaning compositions; anti-static sprays for institutional and industrial use; and preparations for use on floor cleaning tools, namely, dust mop sprays," in International Class 3.



for, among other goods, "janitorial preparations for institutional and industrial use; namely, . . . pesticides, in International Class 5,"³

Applicant has appealed. Both the applicant and the Examining Attorney have filed briefs and an oral hearing was held. We affirm the refusal to register.

In the analysis of likelihood of confusion in this case, two key considerations are the similarities between the marks and the similarities between the goods. *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976). Turning, first, to consider the marks, the Examining Attorney argues that the marks are nearly identical; that one of registrant's marks is the term ALL STAR; that the word portion of both applicant's and registrant's design mark is dominant and each would be perceived as the term ALL STAR; that applicant's mark and

³Registration No. 1,867,389, issued December 13, 1994, and owned by BRT, Inc. The additional goods recited in the registration, but not cited as relevant by the Examining Attorney, are "janitorial preparations for institutional and industrial use; namely, paint removers; spot removers; grease removers; stain removers; graffiti removers; hand soaps; floor cleaners; floor waxes, floor polishes; floor buffing compositions; floor stripping compositions; furniture polish; liquid drain cleaners; carpet shampoos; upholstery shampoos; glass cleaning compositions; tile cleaning compositions; oven cleaning compositions; antistatic sprays; and dust sprays," in International Class 3; and

registrant's design mark similarly merge the two words ALL and STAR into a single word and include a design of a five-pointed star; that the fact that applicant's mark drops the second "L" in "ALL" does not change its connotation as "ALL STAR" nor does it distinguish applicant's mark visually or aurally; and that ALL STAR suggests "premier athletes who have distinguished themselves within a given sport."

Applicant contends, on the other hand, that the design portion of its mark is predominant and sufficiently distinguishes its mark from registrant's marks; and that the different spelling of applicant's mark further distinguishes it. Applicant submitted with its brief a list of third-party registrations for ALL STAR/ALSTAR marks and contends that, in view of these registrations, registrant's mark is a weak mark, entitled to a narrow scope of protection, and, therefore, the differences between applicant's and registrant's marks are sufficient to avoid a likelihood of confusion.

We do not find applicant's arguments to be well taken. First, in view of the Examining Attorney's objection, we have not considered applicant's evidence. Not only did applicant submit its evidence of third-party registrations in an untimely manner with its brief, but, as the Examining

"janitorial preparations for institutional and industrial use; namely,

Attorney notes, its submission is from an unidentified source.⁴ Even if we were to consider the registrations to be properly of record, they do not convince us that registrant's mark is a weak mark in connection with the identified goods. The vast majority of the third-party registrations listed are for goods and services not even remotely related to the goods identified herein and many of the marks include additional features. Moreover, third-party registrations by themselves do not show that the marks are in actual use, much less that the actual use has been so extensive that consumers have become accustomed to distinguishing between various ALLSTAR/ALSTAR marks. See, *Smith Bros. Mfg. Co. v. Stone Mfg. Co.*, 476 F.2d 1004, 177 USPQ 462, 463 (CCPA 1973) ["But in the absence of evidence showing the extent of use of any such marks . . . [the registrations] provide no basis for saying the marks so registered have, or may have, any effect at all on the public mind so as to have a bearing on likelihood of confusion."].

disinfectants; and deodorizing preparations," in International Class 5.

⁴ The evidentiary record in an application must be complete prior to the filing of the notice of appeal. See, 37 CFR 2.142(d); *In re Smith and Mehaffey*, 31 USPQ2d 1531, 1532 (TTAB 1994). Further, in order to make registrations of record, soft copies of the registrations themselves, or the electronic equivalent thereof, i.e., printouts of the registrations taken from the electronic records of the Patent and Trademark Office's (PTO) own data base, must be submitted. See, *Weyerhaeuser Co. v. Katz*, 24 USPQ2d 1230 (TTAB 1992).

We agree with the Examining Attorney that the word portions of both applicant's mark and registrant's design mark predominate over relatively minor design elements. In both marks, the designs consist essentially of simple typestyles and star designs, which merely reinforce the connotations of the words ALLSTAR and ALSTAR. Likewise, any spelling and spacing differences do not adequately distinguish applicant's mark from registrant's marks.

The proper test for determining the issue of likelihood of confusion is the similarity of the general commercial impression engendered by the marks. Due to the consuming public's fallibility of memory, the emphasis is on the recollection of the average customer, who normally retains a general rather than a specific impression of trademarks or service marks. *Spoons Restaurants, Inc. v. Morrison, Inc.*, 23 USPQ2d 1735 (TTAB 1991), *aff'd*. No. 92-1086 (Fed. Cir. June 5, 1992); and *In re Steury Corporation*, 189 USPQ 353 (TTAB 1975). We find this principle particularly relevant in this case in view of the fact that, while applicant's and registrant's star designs are not identical and appear in different places relative to the words, both applicant's mark and registrant's design and word marks contain substantially similar components and

are likely to be perceived predominantly as the term ALL STAR. We find that the overall commercial impressions of both applicant's mark and registrant's marks are substantially similar.

Turning to the goods, we note the well-established principle that when the marks at issue are the same or nearly so, the goods in question do not have to be identical to find that confusion is likely. As we stated in *In re Concordia International Forwarding Corp.*, 222 USPQ 352, 356 (TTAB 1983), ". . . the greater the degree of similarity in the marks, the lesser the degree of similarity that is required of the products or services on which they are being used in order to support a holding of likelihood of confusion." It is instead sufficient that the goods are related in some manner and that their character or the circumstances surrounding their marketing are such that they are likely to be encountered by the same people in situations that would give rise to the mistaken belief that the producer was the same. *In re International Telephone and Telegraph Corp.*, 197 USPQ 910 (TTAB 1978).

The Examining Attorney submitted a dictionary definition of "pesticide" as "a chemical used to kill pests, esp. insects and rodents"; and argues that applicant's bait stations include a chemical. At the

hearing in this case, applicant conceded that its bait stations include a chemical. Thus, we find it reasonable to conclude that applicant's goods can be described as containing pesticides.

In support of his position that purchasers are likely to conclude that, when identified by confusingly similar marks, the goods of applicant and registrant emanate from the same source, the Examining Attorney submitted copies of numerous third-party registrations that contain both "bait traps" and "pesticides" in the identification of goods. Although third-party registrations which cover a number of differing goods and/or services, and which are based on use in commerce, are not evidence that the marks shown therein are in use on a commercial scale or that the public is familiar with them, such registrations nevertheless have some probative value to the extent that they may serve to suggest that such goods or services are of a type which may emanate from a single source. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993); *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467 (TTAB 1988).

We find that the record in this case is sufficient to warrant the conclusion that applicant's goods, containing what applicant concedes is a pesticide, and registrant's goods, which comprise pesticides, are closely related. As

identified, both goods are used to kill ants. While registrant's goods are limited to industrial and institutional use, applicant's goods are not limited as to channels of trade and could reasonably encompass sales for industrial and institutional use. Applicant has submitted no evidence contradicting the reasonable conclusion that purchasers are likely to believe that applicant's and registrant's goods, if identified by confusingly similar marks, emanate from the same source.

Applicant seeks to distinguish its goods from those of registrant by arguing that applicant's product is a trap, whereas registrant's product is a chemical that requires application by a janitor; that the channels of trade for the respective goods are different, based on the nature of the goods; and that the large institutional purchasers of applicant's goods are likely to be sophisticated, careful purchasers. Not only has applicant provided no evidence in support of its contentions, but the identifications of goods in the application and registrations do not support such distinctions. "The question of likelihood of confusion must be determined based on an analysis of the mark as applied to the goods and/or services recited in applicant's application vis-à-vis the goods and/or services recited in [the] registration, rather than what the

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evidence shows the goods and/or services to be." Canadian Imperial Bank v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987).

Therefore, we conclude that in view of the substantial similarity in the commercial impressions of applicant's mark and registrant's marks, their contemporaneous use on the closely related goods involved in this case is likely to cause confusion as to the source or sponsorship of such goods.

Decision: The refusal under Section 2(d) of the Act is affirmed.

E. W. Hanak

G. D. Hohein

C. E. Walters
Administrative Trademark Judges,
Trademark Trial and Appeal Board